Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL S. MENZER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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85

## QUESTIONS PRESENTED FOR REVIEW

I. Are a defendant's Fifth and Sixth Amendments right to counsel violated when law enforcement officers interrogate him while he is imprisoned on a different, but related, charge despite the officers' knowledge that the defendant is represented by counsel?

II. Has the Seventh Circuit effectively overruled the Supreme Court's test for admissibility of "other crimes" evidence by creating an "intricately-related conduct" exception?

III. Should district courts be allowed to repeatedly depart from the United States Sentencing Guidelines to promote personal sentencing agendas?

## LIST OF ALL PARTIES BELOW

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were the United States of America and Michael S. Menzer.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented for Review | i |
| List of All Parties Below | ii |
| Table of Authorities | v |
| Opinions Below | 1 |
| Jurisdictional Grounds | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 2 |
| Argument in Support of Granting Petition | 8 |
| I. MENZER'S STATEMENTS TAKEN WHILE HE WAS IN PRISON WERE OBTAINED IN VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS | 8 |
| A. MENZER WAS "IN CUSTODY" FOR *MIRANDA* PURPOSES WHILE HE WAS INCARCERATED IN A WISCONSIN STATE PRISON | 9 |
| B. MENZER'S STATEMENTS WERE NOT FREELY, INTELLIGENTLY AND VOLUNTARILY GIVEN | 11 |
| II. THE SEVENTH CIRCUIT'S "INTRICATELY-RELATED CONDUCT" EXCEPTION CONFLICTS WITH THE RULE 404(B) TEST ESTABLISHED BY THIS COURT | 13 |
| III. THIS COURT SHOULD NOT SANCTION REPEATED AND UNWARRANTED UPWARD DEPARTURES FROM THE HEARTLAND OF THE UNITED STATES SENTENCING GUIDELINES BY DISTRICT COURTS | 15 |
| Conclusion | 17 |
| Appendix | A-0 |

| | PAGE |
|---|---|
| Seventh Circuit Decision: | |
| *United States* v. *Menzer*, 29 F.3d 1223 (7th Cir. 1994) | A-1 |
| District Court Orders: | |
| *United States* v. *Menzer*, No. 92-CR-25 (E.D. Wis.) Magistrate Judge's Recommendations (March 18, 1992) | A-26 |
| Hearing Transcript (April 20, 1992) | A-33 |
| *United States* v. *Menzer*, No. 92-CR-232 (E.D. Wis.) Chief Judge's Order (February 1, 1993) | A-37 |
| Hearing Transcript (February 8, 1993) | A-42 |
| U.S. Const. amend VI | A-49 |
| Fed. Evid. 404 | A-49-50 |
| Fed. R. Evid. 410 | A-50 |
| Fed. R. Evid 609 | A-51 |
| 18 U.S.C. § 34 | A-52 |
| 18 U.S.C. § 844(i) | A-52-53 |
| U.S.S.G. Ch. I pt. A(4)(6) | A-54-56 |
| U.S.S.G. § 2A1.2 | A-56 |
| U.S.S.G. § 2K1.4 | A-57-58 |
| U.S.S.G. § 5K2.2 | A-58 |
| U.S.S.G. § 5K2.9 | A-58-59 |

## TABLE OF AUTHORITIES


| Cases: | PAGE |
|---|---|
| *Arizona* v. *Roberson*, 486 U.S. 675 (1988) . . | 12 |
| *Beckwith* v. *United States*, 425 U.S. 341 (1976) . . . . . | 10 |
| *Berkemer* v. *McCarthy*, 468 U.S. 420 (1984) . | 9 |
| *Davis* v. *United States*, ___ U.S. ___, 129 L. Ed. 2d 362 (1994) . . . . . | 12 |
| *Edwards* v. *Arizona*, 451 U.S. 477 (1981) . . . | 12 |
| *Huddleston* v. *United States*, 485 U.S. 681 (1988) . . . . . | 14 |
| *Massiah* v. *United States*, 377 U.S. 201 (1964) . . . . . | 13 |
| *Mathis* v. *United States*, 391 U.S. 1 (1968) . . | 9 |
| *McNeil* v. *Wisconsin*, 501 U.S. ___, 115 L. Ed. 2d 158 (1991) . . . . . | 12 |
| *Michigan* v. *Jackson*, 475 U.S. 625 (1986) . . | 13 |
| *Minnick* v. *Mississippi*, 498 U.S. 146 (1990) . | 12 |
| *Miranda* v. *Arizona*, 384 U.S. 436 (1966) . . . | 9, 11-12 |
| *North Carolina* v. *Alford*, 400 U.S. 25 (1970) | 3, 13 |
| *Stansbury* v. *United States*, ___ U.S. ___, 128 L. Ed. 2d 293 (1994) . . . . . | 9, 11 |
| *State* v. *Johnson*, 105 Wis. 2d 657, 314 N.W.2d 897 (1981) . . . . . | 3 |
| *United States* v. *Carey*, 895 F.2d 318 (7th Cir. 1990) . . . . . | 15 |
| *United States* v. *Ferra*, 900 F.2d 1057 (7th Cir. 1990) *cert. denied*, ___ U.S. ___ (1992) | 16 |
| *United States* v. *Hattaway*, 740 F.2d 1419 (7th Cir.), *cert. denied*, 469 U.S. 1089 (1984) . . . . . | 13 |

| | PAGE |
|---|---|
| *United States* v. *Hilgeford*, 929 F.2d 316 (7th Cir. 1993) | 13 |
| *United States* v. *Menzer*, 29 F.3d 1223 (7th Cir. 1994) | 1, 9 |
| *United States* v. *Menzer*, No. 92-CR-25 (E.D. Wis.) | 1, 6 |
| *United States* v. *Menzer*, No. 92-CR-232 (E.D. Wis.) | 2, 7 |
| *United States* v. *Muzika*, 986 F.2d 1050 (7th Cir. 1993) | 16 |
| *United States* v. *Rosen*, 896 F.2d 789 (3d Cir. 1990) | 15 |
| *United States* v. *Ruffin*, 997 F.2d 343 (7th Cir. 1993) | 16 |
| *United States* v. *Shackleford*, 788 F.2d 776 (7th Cir. 1984) | 14 |
| *United States* v. *Thomas*, 906 F.2d 323 (7th Cir. 1990) | 16 |
| **Constitution:** | |
| U.S. Const. amend. V | 13 |
| U.S. Const. amend. VI | 2, 13 |
| **Sentencing Guidelines:** | |
| U.S.S.G. Ch. I, pt. A(4)(b) | 2, 16 |
| U.S.S.G. § 2A1.2 | 2, 16 |
| U.S.S.G. § 2K1.4(c)(1) | 2, 16 |
| U.S.S.G. § 5K2.1 | 2 |
| U.S.S.G. § 5K2.9 | 2 |
| **Statutes:** | |
| 18 U.S.C. § 844(i) | 2 |
| 18 U.S.C. § 34 | 2 |
| 18 U.S.C. § 3231 | 2 |
| 28 U.S.C. § 1254(1) | 2 |

| | PAGE |
|---|---|
| 28 U.S.C. § 1291 | 8 |
| Wis. Stat. § 940.203(1) | 2 |
| **Rules:** | |
| F.R.A.P. 4(b) | 8 |
| Fed. R. Evid. 403 | 14 |
| Fed. R. Evid. 404(b) | 2, 13, 15 |
| Fed. R. Evid. 410 | 2 |
| Fed. R. Evid. 609 | 2 |

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PETITION FOR WRIT OF CERTIORARI TO
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## PETITION FOR WRIT OF CERTIORARI

The petitioner, Michael S. Menzer, respectfully prays that the Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on July 21, 1994.

## OPINIONS BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit is *United States* v. *Menzer*, 29 F.3d 1223 (7th Cir. 1994), which is reproduced in the appendix to this petition. Relevant excerpts from the magistrate judge's recommendations, *United States* v. *Menzer*, No. 92-CR-25 (E.D. Wis. March 18, 1992), the district court's rulings in Menzer's first trial, *United States* v. *Menzer*, No. 92-CR-25 (E.D. Wis.

April 20, 1992), and the district court's rulings in his second trial, *United States* v. *Menzer*, No. 92-CR-232 (E.D. Wis. February 1 and February 8, 1993), also are reproduced in the appendix.

## JURISDICTIONAL GROUNDS

The judgment and conviction sought to be reviewed was entered in the United States Court of Appeals for the Seventh Circuit on July 21, 1994. This Court has jurisdiction pursuant to United States Code Title 28, section 1254(1).

## STATUTES INVOLVED

Menzer was convicted of violating United States Code Title 18, sections 844(i) and 34. Also at issue in this case were: Federal Rules of Evidence 404(b), 410 and 609; United States Sentencing Guidelines Chapter 1A(4)(b) and sections 2A1.2, 2K1.4(c)(1), 5K2.1 and 5K2.9; and the Sixth Amendment to the Constitution of the United States. All of these items are reproduced verbatim in the appendix.

## STATEMENT OF THE CASE

In the early 1980's, Menzer bought an old mill and granary in the Town of Waldo, Wisconsin which he opened as the Onion River Mill and Art Gallery. Around that time Menzer also met his former wife, Grace Durfey (Grace). When they met, Grace had a son named Tyrone. In May 1983, Grace gave birth to a second son, Jason. Menzer and Grace were married in December 1983, after which Grace gave birth to a third son, Kyle. Menzer, Grace and all three children lived in the residence on the upper floor of the Onion River Mill.

In 1984, Menzer was charged with three counts of sexual exploitation of a child contrary to Wisconsin Statutes section 940.203(1) on grounds that he allegedly knowingly induced

three children, not the children living with him, to engage in sexually explicit conduct for the purposes of videotaping the conduct. The "sexually explicit conduct" charged involved filming boys showering in the nude, but not sexual contact or assault. On June 18, 1986, Menzer entered no contest pleas to all three charges pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), and *State* v. *Johnson*, 105 Wis. 2d 657, 314 N.W.2d 897 (1981). He received a suspended prison sentence and was placed on probation for six years.

Menzer filed for divorce from Grace in 1989. In the weeks preceding the final divorce hearing, Grace attempted to gain leverage in the divorce proceedings by threatening to report Menzer for sexual abuse of their children. On August 30, 1990, Menzer voluntarily met with Jo Kasha Klest (Klest), a psychotherapist at Lutheran Social Services in Sheboygan, Wisconsin, to help the children cope with the divorce. Klest met with Menzer and the three children the next day, August 31, and another appointment was scheduled for Monday, September 17.

Grace was not present and did she know about either of Menzer's August meetings with Klest. Menzer also wanted Klest to examine the children in order to rebut Grace's threats to report him for sexually molesting the boys. Menzer has always maintained that he never sexually abused or molested Tyrone, Jason or Kyle.

Menzer's divorce from Grace was finalized on Thursday, September 13, 1990. Pursuant to the divorce decree, Grace was awarded custody of the children and Menzer received ownership of the Onion River Mill and Art Gallery, along with $90,000 in debt obligations. Grace and the children remained in the mill residence the weekend after the divorce was granted and Menzer continued to operate the art gallery downstairs. On Saturday, September 15, Grace and Menzer argued over the terms of the divorce settlement, and Grace reiterated her threat to report him to the police for sexually

abusing his children. By the end of the argument, however, Grace retracted that threat.

On Sunday, September 16, Grace began to pack her belongings while Menzer worked at the art gallery. Menzer stayed at the mill all day Sunday, then took the three children to his parents' home in Sheboygan. Grace picked the children up about 8:30 p.m. and returned to the mill. Menzer stayed at his parents' home, watched a videotape and television with them and then went to bed upstairs at about 1 a.m. on Monday, September 17. At approximately 5:33 a.m. that day, Menzer was awakened by the doorbell, went downstairs and met with two Sheboygan police officers who told him that there was a fire at the mill and that Grace and Kyle were at the hospital.

Based on witness statements, the mill caught fire sometime between 3:45 a.m. and 4:08 a.m. A passerby saw smoke and flames coming from the mill and called "911" to report the fire. Firefighters and police responded quickly and caught Grace and Kyle as they jumped from the third-floor bathroom window. The bodies of Tyrone and Jason were later discovered in that bathroom. They died of smoke inhalation and carbon monoxide poisoning.

Sheboygan police and sheriff's deputies brought Menzer to the mill after meeting him at his mother's house. Over the next few hours, Menzer watched the firefighting activities, talked with persons on the scene and walked around the mill several times. He waited on the scene until firefighters recovered the bodies of Tyrone and Jason and then went to the hospital where he met with Grace and Kyle and other family members.

Later that day, Wisconsin Department of Justice Special Agent to the Arson Bureau Gregory Eggum (Eggum), along with Bureau of Alcohol, Tobacco and Firearms (ATF) Special

Agent Michael Quick and other law enforcement and insurance company investigators, began conducting an investigation of the fire. While Eggum denied publicly disclosing the investigators' suspicion that the fire resulted from arson, the Sheboygan County Coroner's report dated September 17, 1990, listed the manner of Tyrone's and Jason's deaths as "undetermined, probably homicide, the fire was deliberately set."

As part of their arson investigation, state and federal investigators requested that Menzer be given a polygraph examination by an experienced ATF polygrapher, John O'Toole. Menzer consented to the test and O'Toole tested him on September 20, inquiring into his possible involvement in the fire. During the polygraph test, Menzer was asked if he participated in the fire, if he started the fire, if he was withholding any information about the fire and if he knew in advance that the fire was going to occur. Menzer responded "no" to each question and O'Toole's opinion was that Menzer "was not deceptive."

In October 1990, Menzer was arrested and charged in state court based on Grace's accusation that he had sexually molested Tyrone, Jason and Kyle. Menzer was incarcerated on a probation hold pending revocation of the probation imposed in 1986. On February 15, 1991, Menzer's probation was revoked and he was sent to prison. Following a jury trial in Sheboygan County on March 1, 1991, Menzer was acquitted of all of the state sexual molestation charges. Menzer's attorney throughout these proceedings was Dennis P. Coffey. Coffey also represented Menzer with respect to the on-going federal arson investigation.

During and after the state court proceedings, Eggum and other government agents continued to focus their arson investigation on Menzer, despite the polygraph results. In late 1990 and in April and June 1991, they questioned Menzer several times, while he was incarcerated and represented by counsel.

The agents knew that Menzer had a lawyer; nonetheless, they questioned him without advising his attorney.

Menzer was indicted by a federal grand jury in January 1992, and charged with arson to the Onion River Mill and Art Gallery in Waldo, Wisconsin which resulted in the deaths of two minor children, contrary to United States Code Title 18, sections 844(i) and 34. His jury trial in that case, *United States of America* v. *Michael S. Menzer*, No. 92-CR-25, began on April 20, 1992, before District Judge Thomas J. Curran. Judge Curran ruled that the government could not go into Menzer's probation revocation or his 1986 convictions resulting from his *Alford* pleas to those charges in its case-in-chief. During the government's opening statement on April 21, 1992, however, the prosecutor referred to the revocation of Menzer's probation. Attorney Coffey moved for and Judge Curran granted an order declaring a mistrial.

Subsequently, the government advised Judge Curran that it would require approximately one week to reconsider and reevaluate the case. On May 8, 1992, the government filed a "motion for clarification and for modification." Judge Curran denied that motion in an order dated May 12, 1992, and in that order also stated that he would not issue "advisory opinions" absent an existing case or controversy. On June 16, 1992, the government filed another motion for clarification, this time seeking dismissal without prejudice as an alternative remedy. Judge Curran again denied the government's request for clarification, stating in his June 25, 1992 order that the government had cited no new authorities or evidence which would cause him to modify his prior rulings. Judge Curran also ordered the government to advise whether it intended to retry Menzer on or before 11 a.m. on June 30, 1992. The government filed a motion to dismiss without prejudice on June 30, 1992, noting that it had learned the previous day that an essential witness no longer was willing to testify. Judge Curran

signed the order dismissing case number 92-CR-25 without prejudice on July 28, 1992.

On December 1, 1992, the grand jury reindicted Menzer on the arson charges. *United States of America* v. *Michael S. Menzer*, No. 92-CR-232. This second case was assigned to Chief Judge Terence T. Evans, who initially indicated that he would abide by any rulings which Judge Curran had made as to pretrial motions on the case, including Menzer's motion to suppress statements and the government's motion *in limine*.

In an order dated February 1, 1993, Judge Evans decided to revisit Judge Curran's rulings on the government's motion *in limine*. Judge Evans ultimately allowed the government to go into Menzer's 1986 convictions in its case-in-chief, reversing Judge Curran's April 20, 1992 decision. Judge Evans also denied various pretrial motions filed by Menzer, including a motion to suppress statements.

Menzer's second jury trial began February 16, 1993, and concluded when the jury returned a verdict of guilty on February 26, 1993. On June 1, 1993, Menzer was sentenced to a term of forty years in prison with credit for approximately twenty days already served, a $10,000 fine, a five-year period of supervised release and a $50 special assessment. The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to United States Code Title 18, section 3231. Judgment including sentence under the Sentencing Reform Act was entered on June 1, 1993. This was a final judgment disposing of all counts against Menzer.

Menzer requested and Judge Evans granted an extension of his time to appeal from ten to thirty days pursuant to Federal Rule of Appellate Procedure 4(b). Menzer filed a timely notice of appeal and jurisdictional statement on June 29, 1993. The United States Court of Appeals for the Seventh Circuit had appellate jurisdiction pursuant to United

States Code Title 28, section 1291 and Federal Rule of Appellate Procedure Rule 4(b). The Seventh Circuit issued its decision affirming Menzer's conviction and sentence on July 21, 1994.

## ARGUMENT IN SUPPORT OF GRANTING PETITION

### I. MENZER'S STATEMENTS TAKEN WHILE HE WAS IN PRISON WERE OBTAINED IN VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

Prior to his first trial, Menzer moved to suppress statements he allegedly made to Special Agent Eggum and other agents on June 19, 1991 and June 28, 1991, while he was incarcerated at the Oshkosh Correctional Institution. The presiding Magistrate Judge recommended denial of that motion on grounds that there was not a sufficient showing that Menzer was "in custody" for *Miranda* purposes, noting that if Menzer were found to have been "in a custodial status" when he made the statements, the statements should be suppressed. Those recommendations were adopted by Judge Curran at Menzer's first trial and by Judge Evans in the second prosecution.

Menzer argued on appeal to the Seventh Circuit that if he were in custody at the time of the interviews it was the government's burden to prove that his statements were freely and voluntarily made. He argued that his refusal to sign a waiver form, the interviewers' refusal to advise his attorney of the interviews despite knowing that he had counsel, the interviewers' refusal to stop questioning after he raised the issue of counsel and their failure to read him his *Miranda* rights all demonstrated that his statements were not freely and voluntarily made.

The Seventh Circuit, adopting the "totality of the circumstances" test utilized by the Second, Fourth, Eighth and Ninth Circuits, concluded that the interviews of Menzer in

prison were not custodial investigations "in violation of his constitutional right to be free from self-incrimination." *Menzer*, 29 F.3d at 1232-33. The *Menzer* court noted that this Court previously declined the opportunity to address whether incarceration constitutes custody for *Miranda* purposes. *Id.* at 1232 n.7. Because the rulings in the circuits conflict with this Court's holding in *Mathis* v. *United States*, 391 U.S. 1 (1968), and its decision this term in *Stansbury* v. *United States*, ___ U.S. ___, 128 L. Ed. 2d 293 (1994), Menzer urges this Court to take that opportunity in this case.

### A. Menzer Was "In Custody" For *Miranda* Purposes While He Was Incarcerated In A Wisconsin State Prison.

The protections established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), apply to all instances of custodial interrogation, regardless of the gravity of the offense, *Berkemer* v. *McCarthy*, 468 U.S. 420, 442 (1984), or whether the person is being held in custody on an unrelated offense. *Mathis*, 391 U.S. at 4-5 (1968). A suspect is "in custody" for *Miranda* purposes whenever his or her liberty is restrained.

The fact that Menzer was being held in prison on another matter, his probation revocation, does not mean that *Miranda* did not apply to the interrogation. In *Mathis*, an IRS investigator met with the defendant in state prison. The defendant was serving a prison sentence on an unrelated matter. The IRS agent did not give *Miranda* warnings to the defendant, but elicited incriminating information from him. A criminal investigation was begun in the next two weeks and he was indicted.

On appeal the government urged this Court to narrow the scope of *Miranda* by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. The Court disagreed:

> There is no substance to such a distinction, and in effect it goes against the whole purpose of the

> Miranda decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody. In speaking of "custody" the language of the Miranda opinion is clear and unequivocal:
>
> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." 384 U.S. at 478. And the opinion goes on to say that the person so held must be given the warnings about his right to be silent and his right to have a lawyer.

*Id.* at 4-5.

This Court has neither overruled nor drawn back from the position set forth in *Mathis*. In *Beckwith* v. *United States*, 425 U.S. 341, 347 (1976), the Court dismissed a petitioner's contention that he was subject to psychological restraints when agents of the Internal Revenue Service interviewed him in a home where he occasionally stayed, citing *Mathis* as persuasive authority for distinguishing the *Beckwith* facts from a "custodial situation." The *Mathis* Court specifically ruled that a suspect is "in custody" when he is confined in a penal institution and is approached by law enforcement officers for the purpose of securing statements implicating the prisoner in illegal conduct. Applying this analysis, Menzer was "in custody" for *Miranda* purposes despite the fact that he was incarcerated due to his probation revocation and not as a result of the arson investigation.

This past term, this Court again contrasted the *Beckwith* noncustodial setting with situations where a suspect is actually

incarcerated. In *Stansbury*, the Court reiterated the simple rule enunciated in *Miranda* and followed in *Mathis*:

> In determining whether an individual was in custody, a court must examine the totality of the circumstances surrounding the investigation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (Citations omitted). Our decisions make clear that the initial determination of custody depends on the *objective* circumstances of the interrogation, not on the subjective views harbored by either the investigating officers or the person being questioned.

128 L. Ed. 2d at 298. (Emphasis added).

There is no question that Menzer was not free to leave the prison in April and June 1991, that his liberty was restrained and that law enforcement officials controlled every aspect of his life. In the isolated setting of prison, Menzer was "surrounded by antagonistic forces and subjected to the techniques of [police] persuasion." *Miranda*, 384 U.S. at 461. The "compulsion to speak" in such situations was recognized by the *Miranda* Court to be greater than that existing "in courts or other official investigations where there are often impartial observers to guard against intimidation and trickery." *Id.* Menzer respectfully urges the Court to grant his petition for certiorari and thereby take the opportunity to reaffirm *Mathis*.

### B. Menzer's Statements Were Not Freely, Intelligently And Voluntarily Given.

Once it was established that Menzer was in custody, the government bore the heavy burden of proving that Menzer freely, intelligently and knowingly waived his rights, including his right to counsel. *Miranda*, 384 U.S. at 475. "Since the state is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only

means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Id.* The government failed to meet that burden.

When the state agents interrogated Menzer in April and June 1991, they were aware that Menzer was represented by criminal defense counsel, yet they never informed Menzer's lawyer of their intent to interrogate Menzer in prison and never specifically asked Menzer if he wanted to talk with his lawyer prior to speaking with them. Moreover, on June 28, 1991, the agents did not read Menzer his *Miranda* rights and did not terminate the interview when he said that he thought he should speak with a lawyer.

The agents knew that Menzer had legal counsel, but justified interviewing him without advising his lawyer on the grounds that they "believed" that Attorney Coffey's representation did not include their arson investigation. Their subjective belief, however, was inconsistent with the objective fact that Coffey was Menzer's attorney. This fact situation distinguishes this case from *Davis* v. *United States*, ___ U.S. ___, 129 L. Ed. 2d 362 (1994). Unlike *Davis*, when Menzer said, "Maybe I should speak with a lawyer," he already had a lawyer of whom the agents had knowledge. Under these circumstances, this statement was more than sufficient for the agents to terminate the interview and call Coffey. *Minnick* v. *Mississippi*, 498 U.S. 146 (1990); *Arizona* v. *Roberson*, 486 U.S. 675 (1988); *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

Unlike the situation in *McNeil* v. *Wisconsin*, 501 U.S. ___, 115 L. Ed. 2d 158 (1991), Menzer did not waive his *Miranda* rights in June 1991 — he refused to sign the waiver form. Nor did Menzer voluntarily waive his right to counsel. The agents simply ignored his rights. The government "has the burden of establishing a valid waiver (of the right to counsel). Doubts must be resolved in favor of protecting the constitutional

claim." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986). That burden was not met in Menzer's case.

As this Court noted in *Massiah* v. *United States*, 377 U.S. 201, 205 (1964), secret interrogations of a defendant without the knowledge and "protection afforded by the presence of counsel, contravenes the basic dictates of fairness" in criminal cases. Unless this Court grants Menzer's petition in this case, the Seventh Circuit will continue to thwart *Miranda*, *Mathis*, *Edwards* and *Roberson* by a condoning an end-run around a suspect's Fifth and Sixth Amendment rights.

## II. THE SEVENTH CIRCUIT'S "INTRICATELY-RELATED CONDUCT" EXCEPTION CONFLICTS WITH THE RULE 404(B) TEST ESTABLISHED BY THIS COURT.

Over defense objection, the government sought to introduce evidence regarding the 1984 charges that Menzer sexually exploited children, his 1986 convictions of those charges and subsequent allegations by Grace that Menzer abused his children. Judge Evans acknowledged that Menzer had entered pleas to the 1984 charges pursuant to *North Carolina* v. *Alford*, 400 U.S. 25 (1970), and that the state court judge presiding over those proceedings characterized them as "no contest" pleas; however, Judge Evans stated that he did not believe the pleas should be viewed as "no contest" because he did not believe the state of Wisconsin allowed such pleas. He then concluded that the issue was irrelevant because he was admitting evidence of the 1984 charges, the 1986 convictions on those charges and subsequent allegations of sexual activity involving Menzer's own children, on grounds that such evidence "may very well go to the *motive* for the defendant to commit the offense." (Emphasis added).

Relying on its decisions in *United States* v. *Hilgeford*, 929 F.2d 316 (7th Cir. 1993), and *United States* v. *Hattaway*, 740 F.2d 1419 (7th Cir.), *cert. denied*, 469 U.S. 1089 (1984), the Seventh Circuit affirmed Judge Evans on grounds that the evidence sought to be admitted was "intricately related" to the

prosecution of the arson case, thereby rendering inapplicable the four-prong test adopted in *United States* v. *Shackleford*, 788 F.2d 776, 779 (7th Cir. 1984). These Seventh Circuit decisions conflict with this Court's rule in *Huddleston* v. *United States*, 485 U.S. 681 (1988). The *Huddleston* Court cited four sources of protection from the admission of unfair and unduly prejudicial evidence:

> first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 — as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice (citations omitted); and fourth from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

*Id.* at 691.

The *Huddleston/Shackleford* test requires that the proffered "bad acts" must be similar enough and close enough in time to be relevant to the matter in issue. The matter in issue in this case was whether Menzer set fire to the Onion River Mill. Child exploitation charges leveled against Menzer in 1984 and his convictions on those charges in 1986 were neither similar nor close in time to the charge that he committed arson in 1990, or his supposed motive for the arson, Grace's allegations that Menzer sexually abused Tyrone, Jason and Kyle.

The proffered evidence also was inadmissible under the *Huddleston/Shackleford* Rule 403 analysis. The probative value of evidence that Menzer had been charged with and convicted of child exploitation several years before the fire,

and unproven allegations that he more recently sexually abused his own children, is substantially outweighed by the danger of unfair prejudice to Menzer. As Judge Curran noted when he ruled prior to the first trial that the proffered evidence was *not* admissible, "child molestation is so repugnant, so repulsive and so reprehensible and disgusting that it is very likely to inflame any reasonable person to the point of generating a bias or a prejudice where none existed before." Judge Curran's ruling correctly applied the Rule 404(b) analysis outlined in *Huddleston*.

The Seventh Circuit's "intricately-related conduct" test allows admission of "other crimes" evidence contrary to *Huddleston*. Review is necessary to reaffirm this Court's policy of admitting such evidence only after a careful and considered analysis and balancing of all relevant factors.

## III. THIS COURT SHOULD NOT SANCTION REPEATED AND UNWARRANTED UPWARD DEPARTURES FROM THE HEARTLAND OF THE UNITED STATES SENTENCING GUIDELINES BY DISTRICT COURTS.

Upward departures from the guidelines were intended by Congress to be the "exception," not the rule. *United States* v. *Carey*, 895 F.2d 318, 326 (7th Cir. 1990). *Accord United States* v. *Rosen*, 896 F.2d 789, 792 (3d Cir. 1990). The Commission stressed this theme in its policy statement on departures:

> . . . the Commission believes that despite a court's legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in preguidelines sentencing practice. . . . Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the

> Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the court's departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed.

U.S.S.G. Ch. I, pt. A(4)(b) (emphasis supplied). "When an aggravating or mitigating circumstance is sufficiently rare that the Commission does not specify the amount of the increase, the judge may depart." *United States* v. *Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990) (emphasis added), *cert. denied*, ___ U.S. __ (1992). Arson causing death is specifically referenced and considered by the guidelines. *See U.S.S.G.* §§ 2A1.2 and 2K1.4.

The specific facts of Menzer's case do not cause it to fall outside the heartland of arson cases where death results considered by the sentencing commission. Enhancements for the vulnerability of the victims and multiple counts charged are considered in reaching the base offense level. To further enhance the recommended sentence by an upward departure at least three levels higher than the maximum guideline range was a personalized result-oriented decision by Judge Evans violating the sentencing commission rules.

A judge's "personal disagreement" with the guidelines or the interplay thereof does not provide a reasonable basis for sentencing. *United States* v. *Muzika*, 986 F.2d 1050, 1054 (7th Cir. 1993). The Seventh Circuit has repeatedly criticized Judge Evans for his failure to "follow the clear mandate of the Guidelines . . . ," noting, "[j]udges are not . . . at liberty to impose personalized sentencing agendas." *United States* v. *Thomas*, 906 F.2d 323, 329 (7th Cir. 1990). *Accord United*

*States* v. *Ruffin*, 997 F.2d 343, 344, 347 (7th Cir. 1993) (disagreement with the law does not justify undermining it). Menzer respectfully suggests that this case provides the Court with an opportunity to address flagrant disregard of the United States Sentencing Guidelines by district courts.

## CONCLUSION

For all the foregoing reasons, petitioner Michael S. Menzer respectfully urges this Court to grant his petition for a writ of certiorari.

Dated this 17th day of October, 1994.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL S. MENZER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

IN THE

# United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 93-2594

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

MICHAEL S. MENZER,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 92 CR 232—Terence T. Evans, *Judge.*

ARGUED JANUARY 14, 1994—DECIDED JULY 21, 1994

Before BAUER, COFFEY AND RIPPLE, *Circuit Judges.*

COFFEY, *Circuit Judge.* A federal grand jury sitting in Milwaukee, Wisconsin, returned a one-count indictment against the defendant charging him with arson resulting in the death of his two children. A jury returned a guilty verdict and the defendant was sentenced to forty years imprisonment to be followed by five years of supervised release. Menzer was also fined $10,000 and ordered to pay a $50 special assessment. We affirm.

## BACKGROUND

In the early 1980's Michael Menzer purchased an old mill and granary in Waldo, Wisconsin in which he opened the Onion River Mill and Art Gallery. At this time, Menzer became acquainted with Grace Durfee, who had a son named Tyrone from a previous relationship. In May 1983, Grace gave birth to a second son, Jason, fathered by Menzer and thereafter the couple married in December 1983. Grace gave birth to a third son, Kyle, after the marriage. The family lived on the third floor of the Onion River Mill and Menzer operated his art gallery and souvenir shop on the first and second floors of the mill.

In 1988, Grace and Michael's marriage began deteriorating and Menzer filed for divorce in 1989. Prior to the final divorce proceedings, Grace threatened to report Menzer for his recent sexual abuse of the three boys. Menzer feared that if this information became known to law enforcement authorities it might result in the revocation of his probation for a prior sexual exploitation charge (of other children) to which he pleaded no contest and was convicted in 1986.

On September 13, 1990, the Sheboygan County Circuit Court entered the final decree terminating the marriage and providing for division of the property. The defendant received the mill and art gallery in the settlement encumbered with $90,000 in debt, while Grace obtained exclusive custody of the children. Grace and the boys remained in their residence above the mill for three days after the divorce was finalized while the defendant resided in his mother's home. On September 15, 1990, Grace and Menzer had an argument in which she again threatened to report his recent sexual abuse of her sons to the police. On the night of September 16, Grace and the boys were sleeping in the upstairs residence when a fire broke out in the Onion River Mill. Grace escaped with her youngest son Kyle but the two older boys died of smoke inhalation. Menzer, who was sleeping at his mother's home,

was notified of the fire by sheriff's deputies and taken to the scene. He informed the deputies that in July, 1990, he had reported an alleged arson attempt at the Onion River Mill. At that time, Menzer told a sheriff's deputy that he had found a charred, rolled up newspaper under a wooden door on the north end of his building that burned a portion of the building.

One month later, in October 1990, following an investigation by Sheboygan law enforcement authorities, Menzer was arrested for the sexual exploitation of his three boys; his probation (from the 1986 conviction) was revoked and he was imprisoned. Menzer was charged, tried and acquitted by a jury of the new charges of abusing the three boys but remained imprisoned under the probation revocation resulting from the 1986 conviction. While in prison he confided in a fellow inmate, David Knoblock, that he had set fire to the Onion River Mill. Based on a tip from Knoblock, federal agents investigated Menzer regarding the arson while he was incarcerated at the Oshkosh Correctional Institution. Menzer voluntarily met with the agents regarding the arson without counsel present. Based on the evidence obtained in the investigation, including Knoblock's tip, and statements made to the federal agents, the federal grand jury indicted Menzer on January 28, 1992 for the arson of the Onion River Mill. A trial was commenced on April 20, 1992 but the trial judge granted the defendant's motion for a mistrial on April 21 because the government made reference to his probation revocation contravening the court's pre-trial ruling.[1] After discharging the

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[1] Prior to trial, the judge ruled that the government could not introduce evidence of Menzer's prior convictions but could establish that he was on probation at the time of the arson. The court did not rule on whether the government could mention the fact that Menzer's probation was revoked following the arson. Following Menzer's reindictment on December 1, 1992, the case was assigned to a different trial judge. All proceedings prior to the dismissal of the original indictment on July 28, 1992 were before the original trial judge. We will refer to the judge in

*(footnote continues)*

jury, the judge commented to counsel that the government "ha[d] a period of time within which to determine whether they are going to proceed or not." The judge also stated that he would "await the developments in the future." Shortly after the granting of the mistrial, the government, on May 8, filed a motion for clarification of the evidentiary rulings regarding the admissibility of certain statements made by Menzer as well as the probation revocation. The trial court denied the government's motion on May 12. The government filed a second motion for clarification on June 16 which the court denied on June 25. On June 30, 1992, the government filed a motion to dismiss the indictment without prejudice which the court granted on July 28. Menzer was reindicted on December 1, 1992 and made his initial appearance before the magistrate on December 11. On December 14, defense counsel entered a motion to dismiss the arson charge based on the Speedy Trial Act, 18 U.S.C. § 3161, which the court denied on December 17. Aware of the fact that perhaps only fifteen days of nonexcludable time remained in which to try the defendant,[2] the court said it was willing to hold the trial within two weeks, but defense counsel declined to accept this option. Accordingly, the court granted both counsel time to file pre-trial motions which were resolved on February 8, 1993 and the trial commenced on February 16, 1993.

## ISSUES

Menzer raises five separate challenges to his conviction and/or sentence: (1) whether his rights under the Speedy Trial

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*(footnote continued)*

the first trial as "the first judge" or the "original judge" and the judge in the second trial as the "second judge.".

[2] Judge Evans ruled that upon reindictment, the government had a new 70 days to try the defendant. The Assistant U.S. Attorney, however, believed that the Speedy Trial clock may not have restarted upon reindictment leaving only 16 days in which to hold a trial.

Act, 18 U.S.C. § 3161, were violated; (2) whether the federal government had a federal interest in prosecuting the arson of the Onion River Mill; (3) whether statements taken from Menzer while he was in prison violated his constitutional rights; (4) whether the trial judge abused his discretion in admitting evidence of Menzer's prior sexual abuse conviction; and (5) whether the sentencing court's upward departure from the Sentencing Guidelines was proper.

## DISCUSSION

### *Speedy Trial Act*

"The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982), was a legislative response to a perceived failure in the court system to adequately insure that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . ' " *United States* v. *Montoya*, 827 F.2d 143, 147 (7th Cir. 1987) (quoting U.S. Constitution Amendment VI). Under the Act,

> "the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs."

18 U.S.C. § 3161(c)(1). However, the Act allows for the trial court to exclude time from the seventy-day period for various enumerated purposes including "delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *See* 18 U.S.C. § 3161(h)(1)(F).

The speedy trial problem in the case before us arose after the trial court granted a mistrial on April 21, 1992. Section 3161(e) provides that if "the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final." In this case, there is no dispute that following the mistrial on April 21, the government had seventy days in which to retry the defendant. The dispute involves the question of whether the government was entitled to a new seventy-day time period commencing on July 26, 1992, following the dismissal of the initial indictment without prejudice. The government subsequently reindicted the defendant on December 1, 1992 and the case was reassigned to a judge other than the one who presided over the original trial. *See supra* note 1. In a December 17 hearing before the new trial judge, the judge ruled that the government received a "fresh clock" after reindicting the defendant. Menzer argues that the trial court erred in ruling that the government obtained a "fresh clock" upon the December 1, 1992 reindictment. The defendant also argues that the court erred in determining that *if* there was not a fresh clock, that the government's two motions following the mistrial failed to exclude time under 18 U.S.C. § 3161(h)(1)(F). We review the trial court's interpretation of the Speedy Trial Act *de novo*. *Montoya*, 827 F.2d at 146.

The only section of the Act relating to reindictment of a defendant appears in § 3161(h)(6) which provides:

> "[i]f the information or indictment is dismissed upon motion of the attorney for the government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the

> subsequent charge had there been no previous charge."

Although our circuit has not directly faced the question of whether a defendant receives a fresh clock upon reindictment, a number of other Circuit Courts have held that the government does not obtain a fresh clock when the dismissal of the original indictment was upon the government's motion; rather, the time is tolled from the dismissal of the first indictment until the reindictment. The Eighth Circuit construed § 3161(h)(6) in *United States* v. *Leone*, 823 F.2d 246, 248 (8th Cir. 1987), and held that "where an indictment is dismissed on the government's motion and a defendant is later reindicted, the seventy-day period continues to run from the first indictment." The court stated "[w]e find crucial in this section the words: 'had there been no previous charge.' We therefore read this section as stating that for purposes of restarting the seventy-day clock, the second charge is treated as an original charge." *Id. See also United States* v. *Rubin*, 733 F.2d 837, 840 (11th Cir. 1984) ("When an indictment is dismissed on the motion of the defendant, or for reasons other than the motion or request of the government, the seventy-day time period begins to run anew . . . ."); *United States* v. *Rodriguez-Restrepo*, 680 F.2d 920, 921 (2d Cir. 1982) (holding that when the initial indictment is dismissed, the "time between the dismissal and the later reindictment or first appearance on the subsequent indictment is not included in the computations pursuant to the Act" but the nonexcludable time under the first indictment is included). In perhaps the clearest statement regarding the calculation of time under § 3161, the Ninth Circuit stated:

> "Section 3161(d) provides that when an indictment is dismissed on the *defendant's* motion, the subsequent return of a new indictment triggers a new seventy-day time period. *See* [*United States* v. *Karsseboom*, 881 F.2d 604, 606 (9th Cir. 1989)]; *United*

> *States* v. *Harris*, 724 F.2d 1452, 1454 (9th Cir. 1984); *United States* v. *McCown*, 711 F.2d 1441, 1446 (9th Cir. 1983). The seventy-day clock also starts anew if the district court dismissed the first indictment *sua sponte*. *See United States* v. *Feldman*, 788 F.2d 544, 549 (9th Cir. 1986), *cert. denied*, 479 U.S. 1067, 107 S. Ct. 955, 93 L. Ed. 2d 1003 (1987).
>
> However, if the first indictment is dismissed on the *government's* motion, the statute time limit is merely suspended until a new indictment is returned; the seventy-day clock is not reset. *See* 18 U.S.C. § 3161(h)(6); *Feldman*, 788 F.2d at 548, *McCown*, 711 F.2d at 1446."

*United States* v. *Magana-Olvera*, 917 F.2d 401, 404-05 (9th Cir. 1990). *See also United States* v. *Roman*, 822 F.2d 261, 264 (2d Cir. 1987), *cert. denied*, 484 U.S. 954 (1987) ("[t]he Act provides that the speedy trial clock is tolled during the period of time after dismissal, when no charges are pending, and on the new indictment the clock resumes from the point at which it stopped when the original indictment was dismissed"); *United States* v. *Perez*, 845 F.2d 100, 103-104 (5th Cir. 1988), *cert. denied sub nom., Aranda-Rodriquez* v. *United States*, 488 U.S. 847 (1988) ("Under § 3161(h)(6), when an indictment is dismissed on the Government's motion, the statutory time limit is merely suspended until a new indictment is returned. The period between the indictments is excluded from speedy trial calculations, but the clock is not reset.").[3]

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[3] In *United States* v. *Roy*, 791 F. Supp. 179, 180-181 (S.D. Ohio 1991), *aff'd*, 955 F.2d 45 (6th Cir. 1992), the district court stated "[a]lthough it appears the Sixth Circuit has not ruled upon this issue, we agree with those circuit courts that have interpreted this provision tolling the speedy trial time between the dismissal of the original indictment by the government and the filing of the subsequent indictment as necessarily implying that the includable time with regard to the original indictment

*(footnote continues)*

In *United States* v. *Horton*, 676 F.2d 1165, 1170 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), this court had an opportunity to comment on subsection 3161(h)(6) and stated:

> "subsection 3161(h)(6) controls a situation where there is an interval between the time the original indictment is dismissed on the government's motion and the superseding indictment is returned. In that situation, the time limitation is tolled during the period when no indictment is outstanding.
>
> * * *
>
> There was no time gap between the two indictments returned in this case. Nevertheless, a fair implication of the statute is that reindictment for the same offense is permissible and that the time period begins to run with the first indictment."

*Id.* (citations omitted). [4] It is obvious from the decisions of the Second, Fifth, Eighth, Ninth and Eleventh Circuits that the trial judge was incorrect in stating that the clock restarted

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*(footnote continued)*

should be added to the includable time with regard to the subsequent indictment in calculating the speedy trial time period."

[4] See also *United States* v. *Rojas-Contreras*, 474 U.S. 231, 239 (1985), in which Justice Blackmun stated in concurrence,

> Because the criminal process does not always proceed in a linear fashion, the Act addresses second indictments that occur, unlike in this case, following dismissal of the first indictment. When an indictment is dismissed on the motion of the defendant, and the defendant is thereafter reindicted, both the 30-day and 70-day periods run anew. See 18 U.S.C. § 3161(d)(1). In contrast, however, when an indictment is dismissed on motion of the Government, and the defendant is thereafter reindicted, both the 30-day and 70-day periods continue to run from the first indictment, with the proviso that the period during which no indictment is outstanding is excluded from the 70-day calculation. See 18 U.S.C

*(footnote continues)*

upon reindictment. This does not mean, however, that the defendant's speedy trial rights were violated because the defendant is still required to demonstrate that seventy non-excludable days elapsed prior to February 16, 1993 when the new trial commenced.

The defendant's second argument under the Speedy Trial Act is that the government's motions following the mistrial failed to exclude time under § 3161(h)(1)(F). If the government's two motions did exclude the time in question, then there was no Speedy Trial Act violation. The defendant's argument is that the government's May 8, 1992 and June 16, 1992 motions were *post-trial* motions and not *pre-trial* motions and the statute only allows excludable time for "any pre-trial motion." This argument is without merit for the granting of the mistrial necessitated either a new trial or dismissal of the charges. The government's purpose in filing the motions was to determine the admissibility of evidence in a new trial, thus the motions filed following the mistrial were pre-trial motions preceding the impending second trial. *See Henderson* v. *United States*, 476 U.S. 321, 331 (1986) ("[t]he provisions of the [Speedy Trial] Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion"); *United States* v. *Rojo-Alvarez*, 944 F.2d 959, 966 (1st Cir. 1991) ("when the court is presented with papers *styled* as a motion, whether it ultimately determines that the filing is a pretrial motion or an 'other proceeding' under [§ 3161(h)(1)(J)], the court is entitled to exclude at least the period of time during which it considers how to treat the filing"). Accordingly, for purposes of the Speedy Trial Act, the five days to resolve the first pretrial motion (May 8-12, 1992)

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*(footnote continued)*

§ 3161(h)(6). The difference in treatment protects against governmental circumvention of the speedy-trial guarantee.

*Id.* (Blackmun, J., concurring).

and ten days to resolve the second pretrial motion (June 16-25, 1992) were excludable.[5]

Therefore, when Menzer made his initial appearance before the new judge on December 11 following the reindictment (on December 1, 1992), there were sixteen days left under the Speedy Trial Act (15 days of excludable time due to the May 8 and June 16 motions and 1 day of the original 70 days provided in the Act). Two days elapsed on the 12th and 13th of December but on the 14th the clock stopped when the defendant filed a motion to dismiss which was resolved by the trial judge on the 17th of December. At the December 17, 1992 hearing, although the trial court ruled the government had a fresh clock, the judge expressed his willingness to hold the trial within two weeks in case the clock had not restarted upon reindictment. Defense counsel declined to accept this option stating that he desired to file several motions and he had briefs in unrelated cases to file. The trial court gave counsel until December 28, 1992 to file its pre-trial motions. This time (December 17-28) is clearly excludable. *Montoya*, 827 F.2d at 153 ("Time consumed in the preparation of a pretrial motion must be excluded — provided that the judge has expressly granted a party time for that purpose.") (quoting *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985)). Moreover, the time from December 28 until February 8, 1993 when the court resolved the pre-trial motions was excludable

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[5] The defendant claims that if the government's motions serve to exclude time under the Speedy Trial Act, it will "thwart[] congressional intent that the Act expedite trials in the criminal justice system. Adopting the government's argument would be tantamount to sanctioning the manipulation of the system." We disagree, for the trial court is in the best position to determine whether the government has "manipulated" the system and if it so finds, it may dismiss the indictment with prejudice. *See* 18 U.S.C. § 3162(a)(1) (instructing the court to consider "the facts and circumstances of the case which led to the dismissal" when deciding between dismissal *with* prejudice and dismissal *without* prejudice).

under § 3161(h)(1)(F) and § 3161(h)(8).[6] Thus, as of February 8, 1993, fifty-six of the allotted seventy days had elapsed. Eight days of non-excludable time accrued between February 9 and February 16 but six days still remained under the Speedy Trial Act when the trial commenced on February 16. Thus, based on these calculations, there was no violation of the Speedy Trial Act.

**18 U.S.C. § 844(i): Federal Jurisdiction over Arson**

The defendant argues that the district court lacked jurisdiction over this arson prosecution because the arson of a private home had no impact on interstate commerce and thus there was no federal interest. We disagree because the structure in question was not merely a private residence and even if it was a private residence, the court would still have jurisdiction.

In 1970, Congress passed Title XI of the Organized Crime Control Act of 1970 which included 18 U.S.C. § 844(i). Section 844(i) states

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000.00, or both."

"Congress has the power to enact a criminal statute pursuant to the commerce clause as long as the statute controls acts

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[6] At the December 17, 1992 hearing, the second judge offered counsel the choice of trying the case within two weeks, on January 26, 1993 or February 16, 1993 and defense counsel expressed his preference for February 16. The Judge then entered an order excluding the time from December 17, 1992 until trial on February 16, 1993 under § 3161(h)(8).

which have, at least, a *de minimis* effect on interstate commerce." *United States* v. *Stillwell*, 900 F.2d 1104, 1110 (7th Cir.), *cert. denied*, 498 U.S. 838 (1990). In *Stillwell*, we upheld the federal court jurisdiction over an arson conviction stemming from the arson of a private home because

> "[i]n light of the Court's expansive view of Congress' power to legislate under the commerce clause, we think Congress could rationally believe that, in the aggregate, arson of private residences supplied with interstate natural gas has more than a *de minimis* effect on interstate commerce.
>
> * * *
>
> Congress intended § 844(i) to cover any building it constitutionally has the power to reach. Since Congress could reasonably believe that arson of private homes receiving interstate natural gas has more than a *de minimis* effect on interstate commerce, the application of § 844(i) to defendants in this case is not an unconstitutional exercise of power . . . ."

*Id.* at 1111-12.

Our holding in *Stillwell* clearly states the broad scope of § 844(i) and thus if the government presented evidence in this case that Menzer's Onion River Mill received natural gas transported in interstate commerce or that the building had more than a *de minimis* effect on interstate commerce, then prosecution under § 844(i) was proper. At trial, the government presented evidence that the first two floors of the building served as Menzer's art gallery and souvenir business under the name the Onion River Mill and Art Gallery. Menzer stipulated at trial to the fact that he purchased items for resale that traveled in interstate commerce and he served customers from outside the State of Wisconsin. Moreover, natural gas that traveled in interstate commerce was supplied by Wisconsin Gas Company to heat all three floors of the building (the

residence, the art gallery and the souvenir shop). Based on this evidence, prosecution under § 844(i) was proper because the building had more than a *de minimis* effect on interstate commerce. *Stillwell*, 900 F.2d at 1110-12.

**Suppression of Menzer's Statements Taken while in Prison**

Menzer argues that his constitutional rights (set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966)) were violated when law enforcement officials interrogated him while he was in prison and that the statements made while imprisoned should have been suppressed. There is a disagreement between the parties as to the appropriate standard of review when determining whether a custodial interrogation occurred. As we acknowledged in *United States* v. *Lennick*, 917 F.2d 974, 976-977 (7th Cir. 1990), courts in other federal circuits have applied conflicting standards of review ranging from a clearly erroneous review to *de novo* review. *Id.* at 977. Because the defendant does not challenge the facts but merely the legal determination of the lower court, *de novo* review is appropriate.

In *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966), the U.S. Supreme Court held that

> "the prosecution may not use statements, . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

In *Mathis* v. *United States*, 391 U.S. 1 (1968), the defendant was incarcerated in state prison when Internal Revenue agents sought to question him on matters relating to a "routine tax investigation." *Id.* at 4. When a subsequent criminal action was initiated against the defendant for tax fraud, the defendant sought to have the statements made to the IRS agents suppressed and cited *Miranda*. The district court and court of appeals denied the motion to suppress. The Supreme Court granted certiorari to determine whether *Miranda* applied when the defendant "had not been put in jail by the officers questioning him, but was there for an entirely separate offense." *Id.* The Court stated

> "The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."

*Id.* at 4-5. Thus in *Mathis*, the question presented to the court was whether government agents could interrogate a prisoner without giving *Miranda* warnings regarding an offense separate and distinct from the offense for which he was incarcerated. The Court did not expressly address the question of whether imprisonment *per se* constitutes being "in custody" for purposes of *Miranda*. The Second, Fourth, Eighth and Ninth Circuits have held that, when challenging a statement given by a defendant, merely because the defendant is in prison on an unrelated charge does not mean the defendant is "in custody" under *Miranda*. *See United States* v. *Willoughby*,

860 F.2d 15, 23 (2d Cir. 1988) ("we believe that the mere fact of imprisonment does not mean that all of a prisoner's conversations are official interrogations that must be preceded by *Miranda* warnings"), *cert. denied*, 488 U.S. 1033 (1989); *Leviston* v. *Black*, 843 F.2d 302, 303 (8th Cir.) ("[w]hile *Miranda* may apply to one who is in custody for an offense unrelated to the interrogation, [*Mathis*, 391 U.S. at 4-5], incarceration does not *ipso facto* render an interrogation custodial"), *cert. denied*, 488 U.S. 865 (1988); *United States* v. *Conley*, 779 F.2d 970, 972 (4th Cir. 1985) ("declin[ing] to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and [holding] that a prison inmate is not automatically always in 'custody' within the meaning of *Miranda*"), *cert. denied*, 479 U.S. 830 (1986). *Cervantes* v. *Walker*, 589 F.2d 424 (9th Cir. 1978), involved a case in which a sheriff's deputy found a matchbox containing a substance resembling marijuana during a routine search of an inmate's belongings. Upon discovery, the deputy inquired of the inmate what was in the matchbox. The Ninth Circuit ruled that even though the defendant was incarcerated, the interrogation was noncustodial and clearly enunciated the reasons against a *per se* rule that imprisonment alone is sufficient to invoke *Miranda* protections:

> "To interpret *Mathis* as [the defendant] urges would, in effect, create a *per se* rule that any investigatory questioning inside a prison requires *Miranda* warnings. Such a rule could totally disrupt prison administration. *Miranda* certainly does not dictate such a consequence . . .
>
> Adoption of [the defendant's] contention would not only be inconsistent with *Miranda* but would torture it to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart. We cannot believe the Supreme Court intended such a result. Thus, while

> *Mathis* may have narrowed the range of possible situations in which on-the-scene questioning may take place in a prison, we find in *Mathis* no express intent to eliminate such questioning entirely merely by virtue of the interviewee's prisoner status."

*Id.* at 427.[7]

In each of the cases cited above, the courts examined "the totality of the circumstances" to determine whether the inmate was "in custody" as set forth in *Miranda*. Factors the courts considered in determining whether the prisoner was "in custody" include: the defendant's " 'freedom to leave the scene and the purpose, place and length' of the questioning," *Leviston*, 843 F.2d at 304; "a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement," *Conley*, 779 F.2d at 973; and whether "circumstances . . . suggest[ ] any measure of compulsion above and beyond [the] confinement," *Willoughby*, 860 F.2d at 24.[8]

We now turn to the facts in the particular case before us to determine if a custodial interrogation occurred. Prior to the first trial, the U.S. Magistrate Judge held a hearing on the defendant's motion to suppress and heard the testimony of the one of the agents who performed the interrogation of the defendant Menzer (Special Agent Gregory J. Eggum) as well as the testimony of the prison registrar Lawrence R. Stahowiak. Following the hearing the magistrate judge issued his recommendation to the trial judge that the statement not

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[7] The U.S. Supreme Court has declined an opportunity to address the question of whether incarceration constitutes custody for purposes of *Miranda*. *See Bradley* v. *Ohio*, 497 U.S. 1011, 110 S. Ct. 3258, 3239 (1990) (Marshall, J. dissenting from denial of certiorari).

[8] The test for whether an individual is "in custody" under *Miranda* outside the prison context, for instance during a *Terry* stop, is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984).

be suppressed because Menzer was not "in custody" for purposes of *Miranda*. The defendant does not challenge the factual findings but rather the legal conclusions reached by the lower court which adopted the magistrate judge's recommendations. The defendant argues that because he was incarcerated he was not free to leave the interrogation and thus he was "in custody" under *Miranda*. While it is undisputed that the defendant was incarcerated for an unrelated crime, we conclude that Menzer was not "in custody" for the purposes of *Miranda* because there was no "added imposition on his freedom of movement" nor "any measure of compulsion above and beyond [imprisonment]". The defendant was advised an officer was coming to talk with him, the defendant voluntarily appeared at the interviews, he was not restrained in any manner, the room was well lit, there were two windows exposing the interview room to the prison administrative office area, the door to the interview room was unlocked and the defendant was told by Agent Eggum that he was free to leave at any time. [9] The magistrate judge specifically found that the agents told Menzer that "he was free to take a break, leave, or terminate the interview at his discretion." Moreover, based on the testimony of the prison registrar, the magistrate judge found that at the Oshkosh Correctional Institution "[i]t is generally understood throughout the prison that participation in any such meetings [with law enforcement officers] is voluntary and inmates need not attend." Finally, before the last interview, on June 28, 1991, Agent Eggum faxed ten written questions to the registrar and requested that the questions be forwarded to Menzer. Eggum did this so Menzer would know what to expect in advance and thus be free to decide whether he wanted to meet with the agents. Based on the foregoing, we are in agreement with the trial court's denial of the motion to suppress because despite the defendant's incarceration, there was no "added imposition on his freedom of movement,"

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[9] The magistrate judge found "there was no evidence of police coercion" thus we assume the interrogating officers were unarmed.

*Conley*, 779 F.2d at 973, nor "any measure of compulsion above and beyond [the] confinement." *Willoughby*, 860 F.2d at 24. As the Ninth Circuit stated in *Cervantes*, a holding that incarceration *per se* results in custody under *Miranda* would result in "the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart." *Cervantes,* 589 F.2d at 427. Thus we hold that upon examining the totality of the circumstances, the interview by the law enforcement officers of the imprisoned defendant was not in violation of his constitutional right to be free from self-incrimination.[10]

**Admission of Prior Child Sexual Abuse Convictions**

The defendant argues that at the second trial, the judge abused his discretion in admitting evidence of Menzer's 1986 conviction for sexual exploitation of a child and the fact that Menzer was on probation for that conviction in 1990 when the arson occurred.[11] The defense claims that the evidence is inadmissible under Fed. R. Evid. 404(b)[12] because it fails to pass

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[10] We also note the magistrate judge found that during one of the interviews Menzer had with the law enforcement officers while he was incarcerated, Menzer commented "maybe I should speak with a lawyer." The U.S. Supreme Court has just made clear that this statement does not constitute a request for counsel. *See Davis* v. *United States*, 62 U.S.L.W. 4587, 4590 (June 24, 1994) (holding that suspect's statement "maybe I should talk to a lawyer" was not a request for counsel. "Unless a suspect actually requests an attorney, questioning may continue").

[11] At the first trial, the trial judge, who was not the same judge who presided at the second trial, ruled the evidence was inadmissible because "child molestation is so repugnant, so repulsive, and so reprehensible and disgusting that it is very likely to inflame any reasonable person to the point of generating a bias or a prejudice where none existed before."

[12] Rule 404(b) provides in relevant part:

*(footnote continues)*

the four-part *Shackleford* test.[13] The government, on the other hand, argues that we need not apply the *Shackleford* test if the evidence was "intricately related to the facts of this case." *United States* v. *Hattaway,* 740 F.2d 1419, 1425 (7th Cir.), *cert. denied,* 469 U.S. 1089 (1984). In *United States* v. *Hilgeford,* 7 F.3d 1340, 1345 (7th Cir. 1993), we held that we need not apply the *Shackleford* test when the evidence sought to be admitted is "intricately related" to the charged offence. *Id.* (quoting *United States* v. *Hargrove,* 929 F.2d 316, 320 (7th Cir. 1991)). Thus we agree with the government's position that if the evidence of Menzer's prior sexual exploitation conviction was in fact "intricately related" to the prosecution of the arson case, then the *Shackleford* test is inapplicable. If the government can establish the intricate relation between the prior conviction and the present arson case, then the evidence is admissible if it also passes the balancing test required by Fed. R. Evid. 403.[14] *Hilgeford*, 7 F.3d at 1345. Finally, "[w]hen

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*(footnote continued)*

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissable for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, . . .

[13] In *United States* v. *Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984), this court established a four-part test for determining whether evidence is admissible under Rule 404(b). The test is whether

> "the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, . . . (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

[14] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

*(footnote continues)*

reviewing a district court's decision to admit evidence, we will reverse the court's decision only when we find an error which rises to the very serious, and uncommon, level of an abuse of discretion. Abuse of discretion only occurs when no reasonable person could take the view of the trial court." *Id.*

The government's theory of the case was that Menzer, who was on probation in 1990 for his 1986 conviction for sexual exploitation of a child, burned down the Onion River Mill where his wife and three children were sleeping to prevent her and the children from reporting that he had been sexually abusing the three children which would result in revocation of his probation. Accordingly, the government sought to admit the evidence of the 1986 conviction and the fact that Menzer's probation could have been revoked (for the alleged sexual misconduct with his three sons between 1986 and 1990) to establish his motive in burning down the building. The trial judge ruled that the evidence was admissible only for a limited purpose and instructed the jury accordingly: "[y]ou may consider this evidence only on issues like Mr. Menzer's motive, his intent, his knowledge and the absence of mistake. This evidence is to be considered by you only for this limited purpose." *See United States* v. *Torres*, 977 F.2d 321, 329 (7th Cir. 1992) (holding that the admissibility of other acts "is treated with great deference because of the trial judge's first-hand exposure to the witnesses and evidence as a whole, and because of his familiarity with the case and ability to gauge the likely impact of the evidence in the context of the entire proceeding"). Upon review of the record, we hold that the trial court did not abuse its discretion in admitting the evidence of the conviction and probation because it was intricately related to the arson prosecution as probative evidence

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*(footnote continued)*

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

of Menzer's intent (motive). Menzer had good reason to fear that if his wife reported him to the authorities his probation would have been revoked and he would have been imprisoned for the 1986 conviction. As we have just stated, the evidence is exceedingly probative as to Menzer's motive. Rule 403, however, requires that the probative value of the evidence outweigh its unfair prejudicial effect. "[T]he more probative the evidence, the more the court will tolerate some risk of prejudice, while less probative evidence will be received only if the risk of prejudice is more remote." *Torres*, 977 F.2d at 328. The defendant argues that the risk of unfair prejudice arises from the possibility that the jury may be biased against a previously convicted child molester. In the instant case, we are confident that any prejudice was minimal because the court did everything in its power to reduce any possibility of prejudice by instructing the jury not to consider the evidence for any other purpose than "motive, intent, knowledge and absence of mistake." *See United States* v. *Severson*, 3 F.3d 1005, 1015 (7th Cir. 1993) ("[w]e rely on our belief that juries heed the instructions"). Accordingly we hold that the trial court did not abuse its discretion when it admitted the evidence along with an accompanying instruction limiting the jury's use of the evidence.

**Upward Departure from Sentencing Guidelines**

The trial court set the defendant's base offense level at thirty-three and then added two levels for an obstruction of justice under U.S.S.G. §3C1.1 because of the defendant's "numerous false statements to the authorities" and his testifying falsely under oath at trial. The court added two more levels for a total offense level of thirty-seven under § 3A1.1 for a vulnerable victim. The defense does not challenge either of these enhancements or the base level of thirty-three. The

defendant does argue, however, that the court erred in departing upward from the base level sentence of thirty-three, claiming that the court failed to clearly articulate its reasons for the upward departure. We apply a three-step approach when analyzing upward departures:

> [W]e begin with a *de novo* review of the court's stated grounds to ascertain that they are of a kind that may be relied on to justify a departure. If they are, we then review the facts underlying the departure, and will reverse the district court only if its factual findings were clearly erroneous. Finally, we review the degree of departure to determine if it was reasonable, . . .

*Torres*, 977 F.2d at 329.

The court's stated reason for the upward departure was that the Guidelines base level of thirty-three[15] failed to take into consideration multiple deaths, i.e., Menzer would have received a base level of thirty-three if only one child had died. The court reasoned that in view of the fact two children died and another child as well as the mother were victims of the "extreme violence" perpetrated by Menzer, an upward departure was appropriate. The trial judge stated that because the difference between second degree murder (base level thirty-three) and first degree murder (base level forty-three) was so

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[15] The sentencing judge arrived at the base level of 33 through application of U.S.S.G. § 2K1.4(c) (arson) and U.S.S.G. § 2A1.2(a) (second degree murder). Section 2K1.4(c) instructs the sentencing judge "If death resulted [from the arson], or the offense was intended to cause serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above." In referring to Chapter Two, Part A, the judge remarked that Menzer's criminal conduct constituted either first degree murder or second degree murder and although it was a "close" question, the judge opted for second degree murder and a base level of 33.

great that a five-level upward departure more accurately reflected the severity of the defendant's conduct.

We are of the opinion that the court's stated grounds for departure, i.e., the Guideline's failure to consider the combination of multiple deaths as well as the extreme violence perpetrated on his wife and only surviving child (they were hospitalized due to smoke inhalation and injuries sustained while jumping from a third floor window), constituted a valid basis for departing upward under Guideline section 5K2.1. The Guidelines explain that death is an appropriate factor to consider in departing upward:

> If death resulted, the court may increase the sentence above the authorized guideline range.
>
> Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury . . . .

U.S.S.G. § 5K2.1, p.s. Not only was the court's stated grounds for departure valid under the Guidelines, but there was nothing clearly erroneous about the court's reliance on the facts presented at trial in arriving at the decision to depart upward from the Sentencing Guidelines. Finally, the defendant's heinous conduct (arson resulting in the death of two children) certainly merits the upward departure of five levels. The five-level upward departure placed the defendant at a base level of

thirty-eight which was halfway between second degree murder (level thirty-three) and first degree murder (level forty-three). We think a base level of thirty-eight accurately and properly reflects the severity of the defendant's conduct and thus affirm the trial court.

**Conclusion**

The conviction and sentence of Michael Menzer are

AFFIRMED.

A true Copy:
Teste:

_____

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## MOTION TO SUPPRESS STATEMENTS

Defendant Menzer moves the court for issuance of an order suppressing for use as evidence at trial statements allegedly made by him at the Oshkosh Correctional Institution (hereinafter referred to OCI), on June 19, 1991, to State of Wisconsin, Department of Justice, Division of Criminal Investigation (hereinafter referred to as DCI) Special Agents (hereinafter referred to as SA) Gregory J. Eggum and Daniel Hughes and, on June 28, 1991, to SA Eggum and United States Bureau of Alcohol, Tobacco, and Firearms SA Kevin Kelm. As grounds for such motion, the defendant asserts such statements were obtained in violation of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. This motion was the subject of an evidentiary hearing conducted by this Court on March 11, 1992. Witnesses at that hearing were SA Eggum and OCI Registrar Lawrence R. Stahowiak. Based upon the testimony and evidence adduced at that evidentiary hearing, as well as the stipulated facts, and having considered the arguments of the parties, this Court now makes its findings of fact and proposed disposition.

### Findings of Fact

Between September 17, 1990 through March 31, 1990, defendant Menzer had periodic contact with law enforcement officials regarding the arson which is the subject matter of this indictment. During the course of his contacts, defendant Menzer supplied information orally and in documentary form to law enforcement agents.

On April 25, 1991 SAs Eggum and Hughes met with the defendant at OCI between 8:56 and 11:52 a.m. Prior to entering the interview room, the defendant signed in on a log maintained by the OCI registrar to record visits with inmates. Information recorded in this log includes the inmate's name, the date of visit, the purpose, time in, and time out. Before

interrogating or questioning the defendant, the SAs read the defendant his constitutional rights and the defendant signed a written waiver of those rights. The defendant was informed he should let them know if he needed a drink of water or was uncomfortable. He was also told he could leave the room without permission.

On June 19, 1991 SAs Eggum and Hughes again interviewed the defendant at OCI. At the commencement of the interview, the defendant told the SAs he was not sure whether he wanted to talk to them because they had not done anything with the information he had given to them previously. In response, SA Eggum told the defendant he did not have to talk to them and was free to leave. The defendant was then told they knew who set the fire. The defendant stated he would listen. The SAs then read the defendant his *Miranda* rights and the defendant acknowledged he understood such rights, but refused to sign the waiver portion of the form.

On June 28, 1991 the defendant was again interviewed at OCI by SAs Eggum and Kelm between 1:16 and 3:30 p.m. Before starting that interview SA Eggum, without reading to the defendant his *Miranda* rights, asked the defendant whether he remembered and understood those rights. The defendant responded to the question in the affirmative and stated "maybe I should speak with a lawyer." SA Eggum informed him he could speak to a lawyer and again inquired whether the defendant understood his rights. The defendant said he would speak to the SAs because "I always try to help."

The three (3) aforementioned interviews at OCI were arranged by OCI Registrar Stahowiak, who has the responsibility of such arrangements. It is generally understood throughout the prison that participation in any such meetings is voluntary and inmates need not attend. All of the interviews were conducted in the same 15'x7' room, which was bright and well lighted, having windows on two (2) sides. The room has a door opening into administrative offices which was closed

during the interview. The room contained three (3) chairs and one (1) desk with the defendant being seated in the same place each time, with access to the door. On each occasion, the defendant was advised he should make any needs known to the SAs and he could leave the room without permission. Prior to the June 28, 1991 interview, SA Eggum faxed ten (10) written questions to Registrar Stahowiak with a request that such questions be forwarded to defendant Menzer. SA Eggum employed this procedure to save time because, based upon occurrences at the June 19, 1991 interview, he was not sure whether the defendant would want to speak to the SAs again, he wanted to provide the defendant the opportunity to review the questions he wished to ask him, and to refuse in advance to speak to them. Such questions were presented to defendant Menzer and prison authorities communicated to SA Eggum that the defendant was willing to speak to him.

**Analysis**

The Fifth Amendment privilege against self-incrimination and the right to counsel require police to follow certain procedural safeguards during custodial interrogations of a suspect. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The threshold issue in this case is whether the defendant was "in custody" for the purposes of *Miranda* at the time of the June 19 and 28, 1991 interviews. The defendant bears the burden of proving a custodial interrogation. *United States* v. *Davis,* 792 F.2d 1299, 1309 (5th Cir.), *cert. denied,* 479 U.S. 964 (1986); *United States* v. *Charles,* 738 F.2d 686, 692 (5th Cir. 1984). Interviews of suspects already in prison are not necessarily "in custody" for the purposes of *Miranda.* In these situations, the Court must determine whether there were *more than usual* restraints on the prisoner's freedom. *United States* v. *Willoughby,* 860 F.2d 15, 23-24 (2d Cir. 1988), *cert. denied,* 488 U.S. 1033 (1989); *Leviston* v. *Black,* 843 F.2d 302, 304 (8th Cir.), *cert. denied,* 488 U.S. 865 (1988); *United States* v. *Cooper,*

800 F.2d 412, 414 (4th Cir. 1986); *Cervantes* v. *Walker*, 589 F.2d 424, 428-29 (9th Cir. 1978). In this case, the voluntary interviews at the prison were conducted in the registrar's office. During the talks, the defendant was not restrained in any way. They were in a room with two (2) windows looking out into the general office, the door was unlocked, and also the defendant was advised he was free to leave at any time. The SAs consistently advised the defendant he was free to take a break, leave, or terminate the interview at his discretion. Registrar Stahowiak testified that, while it is the practice of OCI to arrange meetings between inmates and individuals connected with the legal system, inmates are not required to participate in the interviews. There is no evidence here that the defendant was in a custodial setting. Just as in *Leviston* v. *Black*, 843 F.2d at 304, the defendant was incarcerated on unrelated charges, expressed a willingness to speak with investigators about the subject of their investigation, voluntarily went to the interview room on each occasion and was permitted to leave upon request. Furthermore, there was no evidence of any police coercion. Finally, twenty-four (24) hours prior to the third interview, the defendant was provided with a list of questions which the SAs wanted to ask him so that he could make a prior determination of whether he wished to speak with them. Under the totality of the circumstances, the defendant failed to establish he was in the custody of the interviewing SAs for the purposes of *Miranda* during the June 19 and 28, 1991 interviews. Based on the foregoing conclusion, defendant Menzer's motion to suppress statements should be denied.

However, this Court notes that, should it be determined that the defendant was in a custodial status, the statements obtained from him on June 28, 1991 would be subject to suppression. Prior to the commencement of that interview, the defendant stated, "maybe I should speak with a lawyer." The invocation of a defendant's Fifth Amendment right to counsel need not be "clear and unequivocal." *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 124 (7th Cir.), *cert.*

*denied,* 483 U.S. 1010 (1987) (citing *United States ex rel. Riley* v. *Franzen,* 653 F.2d 1153, 1159 [7th Cir.], *cert. denied,* 454 U.S. 1067 [1981]). The court is required to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. *Michigan* v. *Jackson,* 475 U.S. 625, 633 (1986). A court must find that an individual has invoked the right to counsel, if his or her words or actions "reasonably may be so construed." *United States ex rel. Espinoza* v. *Fairman,* 813 F.2d at 124 (quoting *United States ex rel. Riley* v. *Franzen,* 653 F.2d at 1159 and citing *Smith* v. *Illinois,* 469 U.S. 91 [1984] [defendant's statement, immediately after a police officer advised him of his right to counsel, that "Uh, yeah, I'd like to do that" held to invoke the right to counsel]; *United States* v. *Porter,* 764 F.2d 1, 6-7 [1st Cir.], *reh'q denied,* 776 F.2d 370 [1985] [defendant's unsuccessful effort to contact his lawyer by telephone held to invoke the right to counsel]; *United States* v. *Cherry,* 733 F.2d 1124 [5th Cir. 1984] [defendant's statement that "(m)aybe I should speak to an attorney" held to invoke the right to counsel]; *McCree* v. *Housewright,* 689 F.2d 797, 801 [8th Cir. 1982], *cert. denied,* 460 U.S. 1088 [1983] [defendant's statement that his brother "told me he th(inks) I need () a lawyer" held to invoke the right to counsel]). *See also, White* v. *Finkbeiner,* 611 F.2d 186 (7th Cir. 1979) (citing *Maglio* v. *Jago,* 580 F.2d 202 [6th Cir. 1978] ["maybe I should have an attorney" considered a request for a lawyer]; *United States* v. *Clark,* 499 F.2d 802 [4th Cir. 1974] ["I had better talk to a lawyer" considered a request for a lawyer]), *vacated on other grounds,* 451 U.S. 1013 (1981).

In this instance, defendant Menzer was ambivalent about wanting to speak to an attorney. When the defendant's equivocal statement is given a broad construction as required, this Court concludes defendant Menzer had invoked his right to counsel on June 28, 1991 and, under *Edwards* v. *Arizona,* 451 U.S. 477 (1980), such invocation of counsel should have been "scrupulously honored." Since it was not and the SAs initiated further discussions with him, the defendant cannot be found

to have waived his *Miranda* rights. *See Oregon* v. *Bradshaw*, 462 U.S. 1039, 1046 (1983).

In sum, this Court concludes, based on its findings that defendant Menzer was not in custody on June 19 and 28, 1991, his motion to suppress statements is subject to denial. However, if the defendant's situation should be characterized as custodial, his June 28, 1991 statement would be subject to suppression as having been obtained in violation of the dictates of *Edwards* v. *Arizona*.

Accordingly, this Court will recommend defendant Menzer's motion to suppress statements be denied.

## CONCLUSION

**NOW THEREFORE, IT IS HEREBY RECOMMENDED** that the United States District Judge enter an order **DENYING** defendant Menzer's motion to suppress statements;

**IT IS ORDERED** that defendant Menzer's motion for a bill of particulars be and hereby is **DENIED**; and,

**IT IS FURTHER ORDERED** that defendant Menzer's motion for notice of the government's intention to use evidence of other crimes, wrongs, or bad acts be and hereby is **DENIED**;

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule 13.03 (E.D. Wis.), whereby written objections to the foregoing recommendation may be filed in duplicate with the Clerk of Court within ten (10) days hereof. Failure to file a timely objection shall result in a waiver to your right to appeal.

Pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 13.02 (E.D. Wis.), whereby written appeal from any order herein or part thereof may be filed within ten (10) days hereof.

Dated at Milwaukee, Wisconsin this 18th day of March, 1992.

BY THE COURT:

ROBERT L. BITTNER
*United States Magistrate Judge*

THE COURT: Well, 404-B has probably generated more reported appellate litigation than any other subsection of the rules. In such litigious terrain one would expect to find some well-troddened paths that are furnished with helpful guide posts and perhaps even a paved way to the most common destinations.

Reviewing the citations the Court failed to find anything but a vast and varied sources of curves and crossroads which had few guide posts. And those that were found were somewhat confusing to say the least.

The situation really wasn't helped a great deal because the first citation that the Government had in their submission was the citation of 819 federal second 974. And that's a case entitled U.S. versus Harriston. It's a tax case. And I didn't see that there was any relationship to the issue here.

404-B generally excludes evidence of other criminal wrongs or acts unless offered for the purpose of showing motive or one of the other closely defined purposes. The seventh circuit has held that evidence of prior bad acts are subject to a four-part test in order to be admissible.

Under 404-B first it must be relevant to the matter in issue and must address something other than the defendant's propensity to commit the crime charged. Second, it must be similar in nature and close in time to the crime charged. And there are some decisions in the seventh circuit which seem to indicate that the Government's contention that this element is not necessary or the evidence is introduced to show motive.

Cases cited are not all that persuasive. The second citation in the Government's brief is distinguishable the Court believes because it related to a prior conviction brought out on cross-examination of the defendant. Who took the stand in that case.

The third leg of that stool was the prosecution is required to show that the defendant in fact committed the prior bad

act. And I don't think that's an issue from what I've heard here. And fourth, probative value must not be outweighed by its prejudicial effect.

The Court has given careful consideration to the submissions and has taken the time to read the response of the Government here. The problem that the Court has here, that child molestation is so repugnant, so repulsive, and so reprehensible and disgusting that it is very likely to inflame any reasonable person to the point of generating a bias or a prejudice where none existed before.

I really can't envision an instruction which would prevent evidence of two prior convictions from not permeating the jurors' deliberations. And it can be argued that the defendant brought these on himself. We can argue that they were nolo pleas, but there was, of course, a judgment of conviction.

Other courts have held that such things as racial slurs or victims of homosexuality or membership in the Klu Klux Klan or acts of that kind or similar statements or similar membership, although relevant, should be excluded because of the prejudice outweighs the probative value.

The Court has some vague familiarity with the Dowling case. And as I recall that case — And I may be in error here — but I was under the impression that the admission of the testimony was held in that case not to violate the collateral estoppel component of the double jeopardy clause.

MR. COFFEY: Just so there is no mistake, I believe that's what I said.

THE COURT: Oh, is it? I misunderstood you then, counsel. I believe on balance here that the Government has met the test, the four elements that I mentioned earlier, in part, in order to permit some of this evidence to be admitted. It is relevant to show motive.

And although not similar nor close in time, the Court feels that this is not sufficient grounds to exclude the evidence when offered to show motive. I will, however, allow defense counsel to submit a limiting instruction.

The evidence, as I said, is really uncontroverted with respect to the third prong that the defendant in fact did commit the prior bad acts.

Finally, as to the fourth factor, the Court feels for the reasons that I've stated that in some instances at least the probative value is outweighed by the prejudicial effect. And the Court will exclude some of the evidence sought to be offered.

The Court feels that with respect to the two prior sexual assault convictions that the probative value is outweighed by the prejudicial effect and will exclude reference to that. The Court will permit evidence to show that the defendant was on probation at the time of the fire. The Court will exclude the pedophillic behavior as evidenced by the box of pornographic materials and the instruction that it be burned in the event of his death.

The threats from the ex-wife to report the defendant to the authorities is admissible. Only the subsequent trial and acquittal is admissible. The defendant's conversations with Ms. Klest is admissible. As to the probation officer's testimony, it seems as counsel has suggested that defendant's statements may be admissible for whatever conclusion the jury might draw.

And I assume that the conversation with the jailer might also be admissible. It's difficult for the Court at this stage to grant or deny certain evidence that's being offered because, frankly, it should be taken in the light of other evidence that has been offered and received up to that point. And I'm obviously not in that position at this stage. But it does appear that that would be relevant evidence and that perhaps its

probative value would outweigh any prejudicial effect that it might have.

I believe that I have addressed now the issues that have been raised by the motion and will move now to the defendant's motion which relates to the admissibility of the evidence relating to the lie

# United States District Court

EASTERN DISTRICT OF WISCONSIN

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| UNITED STATES OF AMERICA<br>*Plaintiff,*<br><br>v.<br><br>MICHAEL S. MENZER<br>*Defendant.* | Case No.<br>92-Cr-232 |

## ORDER

Michael Menzer was indicted on January 28, 1992, on a charge of arson, in violation of 18 U.S.C. § 844(i) and § 34. The case went to trial in April but it came to an abrupt end when a mistrial was declared during the opening statement of the assistant United States attorney. On December 1, 1992, Mr. Menzer was reindicted on the same charge. Pretrial motions identical to those filed in the first case have been filed. I indicated at a prior pretrial proceeding that the decisions of Magistrate Judge Bittner and Judge Thomas J. Curran, in the previous proceeding, will be followed. Having given further thought on the matter in light of the recently filed motions, that may no longer be a course I want to follow on all issues. I'll talk about one of those issues in a moment, but first I turn to an issue that has not been decided.

Mr. Menzer seeks a ruling that the results of a polygraph examination will be admitted at trial, and he seeks an evidentiary hearing on the issues raised by the motion.

The polygraph was taken on September 20, 1990, 3 days after the arson with which Mr. Menzer is charged. The polygraph was administered, apparently as an investigatory tool,

by a special agent with the Bureau of Alcohol, Tobacco and Firearms. The result of the test was that Mr. Menzer showed no deception in denying involvement in the arson. The government opposes the admission at trial of the results of the examination. It contends that at the time the test was administered, the investigators did not know whether Mr. Menzer was a suitable candidate for a polygraph examination. Furthermore, because there was no prior agreement on its admissibility at trial, the government states:

> Michael Menzer had nothing to lose by taking the test. Had he failed it, the results would not be admissible. Unless there is an agreement before the test that it can be used as evidence, it should be suppressed as unreliable. Investigators use polygraphs in an attempt to take a shortcut in investigations. Here the test was administered prematurely and this strategy failed.

The situation is somewhat unusual in that the government administered the test it now wants excluded. Most cases involve tests administered by an examiner for a defendant who wants to show his innocence of a crime.

In this circuit, the admissibility of polygraph examinations, even one administered by a person hired by the defense, is left to the discretion of the trial court. *See, e.g., United States* v. *Tucker*, 773 F.2d 136 (7th Cir. 1985); *United States* v. *Williams*, 737 F.2d 594 (7th Cir. 1984). In order to properly assess the issue, I will conduct a hearing on the point along with the other matter I now address.

The other matter is the government's motion *in limine* to admit evidence. A motion to admit evidence had been filed prior to the previous trial as well, and it was a misunderstanding about the rulings on that motion which caused the mistrial. The government states that does not want to revisit the issues previously decided, but "[b]ecause of an issue raised by these rulings as well as a need for clarification in this case the

government seeks a ruling on the admissibility of evidence concerning Michael Menzer's molestation of the three Menzer boys." The argument is that excluding this information leaves a "significant conceptual void in the case."

The government outlines the following background allegations. In December 1983, Mr. Menzer married Grace Durfee, a woman with whom he had a child. She was also the mother of another son. During the marriage a third son was born. In 1986, Mr. Menzer was convicted of the sexual exploitation of three other boys. He was placed on 6 years probation, with the first 6 months to be served in the Sheboygan County Jail.

The Menzer's marriage was unhappy. The government hopes to prove that on several occasions Grace Menzer witnessed her husband sexually abusing their three children. She threatened to report him to the police, but never did because he threatened her by saying that she, a native of the Philippines, could be deported for allowing the abuse to occur.

In 1989, Michael Menzer filed for divorce. On August 30, 1990, he made appointments for his children with a social worker. They saw the social worker on August 31. Mr. Menzer inquired whether the social worker could determine whether the boys had been sexually abused. She said she could. Another appointment was scheduled for September 17, 1990.

On September 13, an order ending the Menzer's marriage was filed in Sheboygan County circuit court. On September 15, the Menzers had a heated argument. Grace Menzer threatened to report the sexual abuse, which Mr. Menzer knew could be a basis for revocation of his probation. The mill burned, killing two of the boys, on September 17, 1990. Subsequently, Mr. Menzer's probation was revoked because of the alleged molestation. A subsequent trial on the charges based on that conduct resulted in an acquittal.

The government states that it wishes to use the evidence of Mr. Menzer's alleged molestation of the boys to show a motive for the arson, but that it is not relying on rule 404(b) of the Federal Rules of Evidence to support its admissibility.

I have examined the motions filed in the earlier case and have read the transcript of Judge Curran's ruling on those motions. It appears that in the earlier motions the government referred to the molestation of the boys by a shorthand term — pedophilic behavior. In his ruling, Judge Curran clearly excluded "pedophilic behavior as evidenced by the box of pornographic materials . . . ." He also, as is clear to everyone now, excluded reference to the revocation of probation. As I stated above, the reason for the revocation was Mr. Menzer's alleged sexual assault of his children. However, Judge Curran also made the following rulings:

> The threats from the ex-wife to report the defendant to the authorities is admissible. Only the subsequent trial and acquittal is admissible. The defendant's conversations with Ms. Klest is admissible. As to the probation officer's testimony, it seems as counsel has suggested that defendant's statements may be admissible for whatever conclusion the jury might draw.

Transcript, p. 31.

Judge Curran threaded a line through what he considered to be probative evidence and other evidence, the probative value of which he thought was outweighed by the danger of unfair prejudice. The problem is, the line is a rather fine one. Given that I have to now make the evidentiary calls in this case, I think it is better than I make my rulings on a clean slate rather than get bogged down in trying to discern Judge Curran's intentions on all of these issues. I will, therefore, give the government a chance at the hearing I am scheduling to ask for

new rulings on all of these issues. In anticipation of the hearing, it would be helpful if the government would list, in chronological order, all factual events that occurred reasonably close in time to the arson which it wants to present to the jury.

Having considered prior rulings and present submissions,

IT IS ORDERED that Mr. Menzer's motion to suppress statements is DENIED.

IT IS FURTHER ORDERED that the motion for notice of the government's intention to use evidence of other crimes, wrongs, or bad acts is DENIED.

IT IS FURTHER ORDERED that the motion for a bill of particulars is DENIED.

IT IS FURTHER ORDERED that an evidentiary hearing on Mr. Menzer's request to admit the results of a polygraph examination and argument on the admission of evidence that was the subject to Judge Curran's decision will be held on February 8, 1992, at 2 p.m.

Dated at Milwaukee, Wisconsin, this 1 day of February, 1993.

BY THE COURT:

TERENCE T. EVANS
*CHIEF JUDGE*

THE COURT: Okay. Take a short recess and then I'm going to make a series of rulings on the polygraph and on these items in the chronology. Okay. We'll take about a ten minute break.

(Short recess then taken.)

THE COURT: Okay. What I'm going to do is make a series of rulings on the admissibility of various alleged historical events in the case. After I make those rulings I'll make a ruling on the motion to admit the polygraph exam results. And after that I'll hear brief argument on the motion filed this morning by the defense for a continuance in the case. It's my hope in making these various rulings that we will avoid any misunderstanding as to the scope of this particular trial so that all parties are clear as to what will be admissible and what will not be admissible during the trial of the case.

As everyone knows, motions in limine are always somewhat difficult because the Court is not in a position to judge the particular ruling based on a whole set of facts that have been developed in the record during the trial. So as to any of these points that I rule to be admissible there may still be an objection that can be made during the trial and if circumstances have drastically changed I would, of course, reserve the right to change the ruling that I've made on the admissibility of any of these points. All I can do really now is sort of tell you which way the wind is blowing on these issues so that you will have some guidance as we proceed through the trial.

On the first series of rulings I think it will be helpful to you if you keep this chronology in front of you and note in the margins yes or no as to whether or not these various items will be received. In ruling on this series of issues I must say I think there's some kind of a blend here of things that are directly admissible or would be admissible under Rule 404(b) or at least require analysis under Rule 404(b) as to whether or not the items would be admissible or not. So I've considered

Rule 404(b), Rule 403 on what relevant evidence may be excluded.

And I've also considered, of course, Rule 609 regarding the admission of prior convictions. That last point with a bit of a twist because the conviction is, Rule 609 really is aimed towards a situation where a conviction is being sought to be placed in front of the jury to detract from the credibility of a defendant or a witness. The prior convictions in this case are not really sought for that purpose but, rather, for establishing some sort of motive on the part of the defendant to commit the crime charged in the indictment. Okay. So I'm not going to give elaborate reasons on all of these. I'm just going to tell you what the bottom line is.

The November 21st, 1980 fourth degree sexual assault conviction following a no contest plea resulting in a two year probation is inadmissible.

The May 21st, 1983 entry regarding the parenting of Tyrone Menzer is admissible as is the wedding in December of that year.

The June 28th, 1984 matter contains two items. One, the fact that the, that Menzer was charged with sexual exploitation of a child and the second regarding the execution of the search warrant, the recovery of the box and the statement on the box regarding what to do with this box in the event of the death of Mike. The, all the matters relating to the search warrant in 1984, that statement, are excluded. The fact that he was charged with the crime will be covered in the, my ruling on the June 4th, 1986 entry here. So I'll hold that until I get to that entry.

The January 15th, 1985 parenting of Kyle is obviously admissible.

The 1986, which is a critical matter here, the June 4th, 1986 matter, it's my view that that prior conviction is admissible and will be received in evidence during the trial of the case

as will the fact that the defendant was placed on probation, was actually given a split sentence, 18 months in prison with six months probation.

MR. COFFEY: Judge —

THE COURT: The six months —

MR. COFFEY: Judge, I'm sorry. Just so the record is accurate, that recitation is not accurate.

THE COURT: As to the disposition?

MR. COFFEY: There were 18 month sentences imposed and stayed and the defendant was placed on six months probation. I'm sorry.

THE COURT: Six years?

MR. COFFEY: Six years.

THE COURT: The six years probation is the important thing.

MR. LICCIONE: Right.

THE COURT: So if it was 18 months in prison stayed and six years probation, whatever the accurate fact is to the disposition, that disposition is admissible. The fact has been raised here regarding that this was an Alford plea. I don't want to get into the details of what happened in front of Judge Bolgert here on December 19th, 1985 in the proceeding where Mr. Menzer was represented by Bernie Freudenfeld, but the statement by the Court on page six, page eight at the bottom where the Judge says, "It's my understanding that this is a no contest plea with the condition that he is conceding no guilt," I don't agree with that. I agree that's what the Judge said but I don't agree that his plea should be viewed as a plea of no contest. But I don't think it's particularly determinative of whether it's admissible or not in this case. I think the fact that he was convicted, the government can put before the jury the

fact that he was convicted of this offense and what the disposition was and draw the jury's attention to the fact that he was on probation and may use that in its endeavor to prove that Mr. Menzer started the fire in this case.

MR. COFFEY: Judge, I'm sorry to interrupt and I know the Court's trying to do this quickly, but I would just ask that the record reflect our objection that pursuant to Rule 410 which talks about no contest pleas being inadmissible that we believe it wholly inappropriate that that court record be admitted.

THE COURT: Okay. You may —

MR. COFFEY: Thank you.

THE COURT: Your objection is noted but I overrule it. And again I want to be sure that we understand the basis for the ruling is not that the conviction will go to the, to detract from the credibility of the defendant as a witness in this proceeding if he chooses to testify but, rather, the status of the defendant as being a person on probation for a sexually related offense involving children and the subsequent activity involving allegations of his own children which may very well go to a motive for the defendant to commit the offense. So I don't think it makes any difference in this analysis under Rule 410 or any other rules of federal, federal rules of evidence here whether I characterize this Alford plea as a no contest plea or not.

I would note that the, that I believe in the State of Wisconsin, I don't have the statute in front of me, the statutory pleas in a criminal case in Wisconsin are guilty, not guilty and with the permission of the Court no contest. The statute reads something along that line. I haven't looked, I think I looked at that when for curiosity's sake during the Lawrencia Bembenick proceedings to see what the state law said on that point. The State of Wisconsin doesn't statutorily recognize a quote "Alford" close-quote plea. I view it as a plea of guilty.

All right. Be that as it may the items listed under 1987 to 1990, Grace Menzer's witnessing various acts of Michael Menzer, generally admissible but subject to some control on the time, the ability to observe, all these sorts of things. But I think as a basis for subsequently arguing to the jury that Mr. Menzer had a motive for committing this crime, again, it's not whether I believe the government's argument that he committed the crime to snuff out the lives of his children, the government's permitted to argue its theory of the case to the jury and that would arguably support that theory and I believe it's appropriate to give the government that kind of latitude to argue that.

The divorce papers, April 6th, '89, admissible.

The June 11th, 1990 Menzer report and alleged arson attempt on his property, that fact and perhaps some others regarding it, I don't know what the details are of that, but I think that it is a matter that is appropriate and I'll receive it.

The August 30th, 1990 matters regarding the social worker will be received. The August 31st, 1990 matters also will be received.

The telephone contact of September 2nd is admissible. The September 4th, 1990 incident, telephone, I don't know if it's telephone, simply a report here to a probation officer is admissible.

The September 30th, 1990 final disposition of the assets of the estate is admissible.

The September 15th fight, alleged to be fight here concerning allegations of Michael Menzer's continued activity with the children is admissible.

The September 16th, 1990 events are admissible all through the various, all through those various time frames that are alleged there. Obviously the 4:08 in the morning events of September 17th, those are admissible. All of the events of the, of September 17th that take up the bottom of

page four and going over to, through the middle of page five, all of those events will be admissible.

I want to come back to September 18th, 1990 in a moment, I'll just pass that one. The notification is on, of findings on September 26th, 1990 would be admissible.

The October 17th, 1990 arrest on a probation hold is inadmissible. Again, any of these matters that are inadmissible, if the defendant wants to put them in he can but the government will not be allowed to put that in.

The charge of October 24th, 1990 against the defendant is inadmissible.

The filing of the proof of loss with Heritage on November 16th, 1990 is admissible. The matters regarding the November 6th, 1990 fire in the Sheboygan County Jail on the defendant's statement that he had made his peace with God about the last fire I'm excluding under Rule 403.

The February 15th, 1990 revocation is ruled inadmissible. Again, all of these with the same ability of the government, the defense, if the defense wants to put that in it can.

The results of the trial of March 1, 1991, inadmissible by the government.

The alleged admissions to a fellow inmate in the correctional system between late March and early April of 1991 will be admissible, may be received.

And the June 19th, 1991 admission of the defendant regarding his interest in children, so to speak, is inadmissible.

Now, I would like the government to tell me a little bit more about this September 18th, 1990 videotape. What's that about?

MR. LICCIONE: Your Honor, we placed that more in there just for the sake of chronology. Mr. Menzer as reported to the Sheboygan County Sheriff's office on July 11th that

there was, that somebody attempted to burn his house. And what he had was a rolled up newspaper that was burned at one end that as I recall the police report he indicated he found walking around the house that day. It was on the north end. He didn't claim to see anybody. As I recall the Sheboygan County deputy sheriff did not take

## AMENDMENT 6

**Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.

**Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes**

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that

upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendre;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(As amended Pub.L 94-149, § 1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

**Rule 609. Impeachment by Evidence of Conviction of Crime**

**(a) General rule.** For the purpose of attacking the credibility of a witness,

(1) evidence that a witness, other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs it prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

**(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

**(c) Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent

procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(As amended Mar. 2, 1987, eff. Oct. 1987; Jan. 26, 1990, eff. Dec. 1, 1990.)

**18 U.S.C. § 34. Penalty when death results**

Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.

(Added July 14, 1956, c. 595, § 1, 70 Stat. 540.)

**18 U.S.C. § 844(i)**

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting

interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

# CHAPTER ONE - INTRODUCTION AND GENERAL APPLICATION PRINCIPLES

## PART A - INTRODUCTION

### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

**(b) Departures.**

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of §5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not

mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

**§2A1.2. Second Degree Murder**

(a) Base Offense Level: 33

*Commentary*

***Statutory Provision:*** *18 U.S.C. § 1111. For additional statutory provision(s),* ***see*** *Appendix A (Statutory Index).*

***Background:*** *The maximum term of imprisonment authorized by statute for second degree murder is life.*

**Historical Note:** Effective November 1, 1987.

**§2K1.4. Arson: Property Damage by Use of Explosives**

(a) Base Offense Level (Apply the Greatest):

(1) 24, if the offence (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling;

(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;

(3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

(4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristic

(1) If the offense was committed to conceal another offense, increase by 2 levels.

(c) Cross Reference

(1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

*Commentary*

***Statutory Provisions:*** *18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275. For additional statutory provision(s), see Appendix A (Statutory Index).*

**§5K2.1. Death (Policy Statement)**

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

**Historical Note:** Effective November 1, 1987.

**§5K2.2. Physical Injury (Policy Statement)**

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or

knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

**Historical Note:** Effective November 1, 1987.

**§5K2.9. Criminal Purpose (Policy Statement)**

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

**Historical Note:** Effective November 1, 1987.